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Hon. Howard Coble, Chairman

Legislative Hearing on H.R. 3035 "The Streamlined Procedures Act of 2005"

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I am an assistant district attorney in Philadelphia. Since January 2000, I have been Chief of the Federal Litigation Unit; the lawyers in this Unit, myself included, respond to hundreds of habeas petitions each year. We are on the front lines, and I believe there are some real problems in the habeas system that have recently grown worse, despite the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996. I also believe, however, that the proposed Streamlined Procedures Act contains carefully crafted, common sense responses to some of the worst abuses we commonly face.

At the outset, I want to emphasize the importance of the issue. There is a great deal at stake – for victims and their families, for state and local governments, for state prisoners, and for the public as a whole. From my perspective, the continuing growth of habeas litigation is a problem in itself; as it expands, local prosecutors are forced to divert scarce resources from other areas of law enforcement, and victims and families are compelled to remain involved in legal proceedings that never seem to end. This can be very frustrating, because endless litigation and repetitive hearings do not bring us closer to the truth. Finally, expansive habeas review shifts the ultimate responsibility for criminal matters from state to federal courts, which both offends any reasonable notion of state sovereignty, and strips state judges of a sense of final responsibility – that is, some other (federal) judge always gets the last word. Simply put, there is a real cost to this litigation, in human, financial, and constitutional terms. While it is important to maintain federal habeas review, this review should be limited so as to minimize unnecessary disruption of state criminal convictions.

I also want to emphasize that these problems are not limited to death penalty cases. On the contrary, they apply across the board, to all of the convictions that reach the federal habeas stage – murder, rape, robberies, and other violent crimes. Only a small percentage of these cases involve the death penalty. The SPA would help protect the rights of victims, and encourage the fair and effective use of the criminal justice system, in all of these cases.

Before I describe in more detail the kinds of problems we currently face in habeas litigation, and how the SPA addresses those problems, I would like to briefly rebut a few of the key points commonly raised by opponents of the SPA.

1. Litigating innocence. SPA opponents argue that the proposed legislation would endanger the ability of prisoners to prove their innocence. On the contrary, as I explain below, the SPA carefully preserves avenues of relief for prisoners who have convincing new proof of their innocence. It is true that the bar for such claims is set high – that is, evidence of innocence must truly be convincing – but that is by necessity. Almost every habeas petitioner claims that he is innocent. If the "innocence" standard is set too low, then the federal courts will be deluged with dubious claims from prisoners who want to re-try their cases, and no criminal verdict would ever be final.

2. The danger of new litigation. I have heard SPA opponents say that now is the wrong time to change the habeas statute – that the uncertainties of AEDPA have finally subsided somewhat, and a new round of reforms would simply start the litigation process all over again. Frankly, I don't understand this argument. First of all, AEDPA litigation has not lately decreased. While some of the major litigation questions are settled, many remain open; in any event, it is clear that many of AEDPA's provisions

missed their mark, do not work, or are being misinterpreted. These problems are a continuing source of litigation. Just to take one example: the AEDPA time limit is now subject to constant erosion by an almost endless array of "equitable tolling" arguments. The only way to fix these problems is through legislation.

3. The death penalty provisions. Some SPA opponents have complained that the SPA's restrictions on death penalty cases go too far. It is important to remember, however, that Section 9 of the SPA – the provision that applies only to capital cases – does not apply retroactively. Rather, states must first *qualify* for this section by guaranteeing experienced and reasonably paid lawyers for all defendants who face the death penalty. These lawyers must also have reasonable funds at their disposal to present their case. Once these guarantees are in place, then Section 9 applies. In other words, this provision aims to prevent errors before they happen.

4. The "procedural default" provisions. Some SPA opponents believe that the proposed law is too strict because prisoners who violate a state procedural rule, and as a result have "defaulted" their claim before they get to federal court, must make a convincing showing of innocence before they can raise the claim in habeas. But I think default jurisprudence is in special need of reform: AEDPA did not address the standard for defaults, and as a result this is now a major loophole in the statute. Prisoners currently have the incentive to withhold claims from the state courts, or to present them half-heartedly; once in federal court, they can argue that any state procedural bars were "uncertain" or "unpredictable." If the federal court agrees – and the "uncertainty" standard is a very slippery one, which does not seem to require much of a showing – then the federal court can address the issue *de novo*, free from AEDPA's deferential standard

of review. The SPA restores some balance here, and re-emphasizes the importance of exhausting each and every claim in state court.

I. PROBLEMS IN CURRENT HABEAS LITIGATION

What follows is a short description of the kinds of abuses that now infect the habeas system; afterwards, I will briefly describe how these problems are addressed by various sections of the SPA.

DELAY

This is a familiar problem, but it is something we see every day. Criminals who were convicted five, ten, or twenty years ago continue to complain about their trials and raise new claims. The facts are endlessly re-litigated. The process goes on and on.

There are many costs associated with delay: The victims pay a heavy emotional cost, of course, because they and their families must relive the crimes again and again, without any closure or sense of justice. But they have no choice but to remain involved – otherwise, the criminal is left alone to make his arguments, and pose as the victim of an unfair system, without any effective rebuttal. The states also bear the cost of delay, because we have to pay for prosecutions that never really end. To take a small example – in the past five years, the number of attorneys in my office who are assigned as full-time habeas attorneys has increased by 400%. The public, too, bears the cost of delay, both because it is expensive to support drawn-out litigation, and because time dilutes the effectiveness of the criminal justice system. Deterrence works best when punishment is

swift and sure; when the process is open-ended, and nothing ever seems final, the system breaks down.

I want to emphasize one other important point: The truth is a casualty of delay. As years pass, memories fade. Evidence is lost. Witnesses who were once sure cannot remember everything. Other witnesses disappear. Some witnesses, who never wanted to get involved in the first place, are extremely reluctant to testify again years later. In fact, the longer the process goes on, the more opportunities exist for witness tampering and intimidation. After all, police and judges cannot protect witnesses forever, and too often a "recantation" (or other new evidence) is simply the product of coercion. The point is, repetitive hearings and re-litigation of guilt do not increase reliability, and they can discourage witnesses from coming forward in the first place.

Causes of delay – unenforced deadlines and "equitable tolling"

In 1996, Congress and President Clinton tried to end unnecessary delays by creating a one-year deadline for habeas cases. Delays still happen, though, because the deadline is not strictly enforced. Sometimes the courts invoke "equitable tolling" and refuse to enforce the deadline simply because its application might be "unfair" to the criminal, which is an unpredictable standard.

The deadlines are often suspended on "equitable" grounds, often in absurd situations. One Philadelphia defendant named Robert Graham, who pled guilty to rape and a series of armed robberies in 1977, filed a habeas petition twenty-four years later. His "excuse" for his late filing was that he had no lawyer, couldn't understand legal

documents, and wasn't able to sufficiently "trust" anyone to help him with the preparation of a federal habeas petition. We pointed out that he had filed other legal petitions in state and federal court over the years, as well as many written prison grievances, and "trust" had never been a problem before. But the court held a hearing, and appointed counsel and a psychological expert for Graham. We were forced to hire our own expert, at a cost of many thousands of dollars. Our expert testified that Graham had been fully capable of filing on time. But the district court held that Graham's "difficulty in trusting and seeking the assistance of others" deserved "equitable tolling" and he could go forward with his case. Graham v. Kyler, 2002 U.S. Dist. LEXIS 26639, *30 (E.D. Pa. 2002).

Or there is Mark Garrick, who robbed and murdered a man in 1975. Garrick said he couldn't file on time (more than twenty years later) because he didn't have enough money for the federal filing fee and he didn't have the right forms to file without it. We found out, however, that the prison *did* have the right forms, and anyway a few days before the filing Garrick had plenty of money in his account – but he spent most of it at the prison commissary on junk food. We eventually won that case in the district court, but only after many briefs and a hearing; even after all that, the Third Circuit somehow concluded this was a close case, and allowed Garrick (with his appointed counsel) to appeal. As a result, this case is still ongoing.

Needless to say, it is frustrating to see these cases, and others like them, continue to drag on. The "equitable tolling" standard is slippery and needs fixing.

Slow litigation in the federal courts

Part of the problem is that federal courts often take too long to decide cases. We have seen some habeas matters sit in the district and circuit courts for years with no action. And there is almost nothing we can do about it.

My colleague, Ronald Eisenberg, testified before this subcommittee about several cases which have languished for years in federal court without any decision at all. As Mr. Eisenberg testified, "Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgment of their brethren in state courts, or to consider the needs of crime victims. The only way that balance can be restored is by congressional statute."

Evading the statute of limitations by "staying" mixed habeas petitions

One common way in which prisoners and district courts defeat the one-year habeas deadline is through "stay and abey" orders. What happens is this: Prisoners file habeas petitions that contain some claims that have already been rejected by the state courts, and one or more new claims. The district court then "stays" the petition, and places it in suspense, while the petitioner tries to exhaust the new claim(s) in state court, in effect starting the process over again.

It hardly needs mention that this practice makes the one-year deadline meaningless. It converts habeas into a jurisdictional foot-in-the-door, where prisoners can park their claims without worrying about deadlines. Plus, the stay-and-abey practice

effectively rewards prisoners who have failed to timely raise their claims in state courts in the first place.

The Supreme Court has recently partially restricted this kind of stay, in Rhines v. Weber, 125 S. Ct. 1528 (2005), but under Rhines a petitioner will still be able to get such a stay upon a showing of "good cause." This vague standard promises to create a wealth of new litigation. In the meantime, we continue to see many such stay orders issued by federal district courts, ensuring years of new delays.

RELITIGATION OF OLD CLAIMS

State criminal convictions are entitled to respect. When the jury (or the judge) weighs the evidence and makes a decision, that is a significant event. Each state has its own rules and procedure for ensuring that their trials are fair, and if there are complaints, each state provides its own review procedure. State judges are just as duty-bound as their federal counterparts to uphold the Constitution. If a prisoner has a federal claim to make, he must make it first in state court. If he does not properly present it to the state courts, the federal courts should not reach it, either. If the state court rejects the claim on the merits, *only then* can he go to federal court – and the federal court must defer to the state court's decision if it was reasonable.

That is the law. It is relatively simple, and it makes sense. If federal courts were free to re-weigh the evidence or litigate new claims, the process would truly be endless, unworkable and unconstitutional. State trials would merely be a prelude to the "main event" in federal court. States would be stripped of the power to enforce their own criminal laws.

Too often, however, federal courts do re-weigh the evidence, or entertain claims that have not been decided by the state courts. There are a number of ways that federal courts can do this; each method allows the court to evade both the exhaustion requirement, and the AEDPA deference standard.

Ignoring "inconsistently applied" state rules

When a state court rejects a claim because it is improper under the state's own rules – for example, it may be waived or raised too late – a later federal habeas court is obligated to defer to the state court's application of its own rules, and must also decline to entertain the claim. Otherwise, a prisoner could violate any state procedural rule, knowing that later the federal court will hear all of his claims anyway. But under the "inadequacy" doctrine, a federal court may decide that the state rule is "inconsistent" and hear the claim anyway, even though the state courts have held that its rules have been violated.

In practice, this means that federal courts can ignore all of what happened in state court, and entertain defaulted claims as if they were fresh and properly preserved, simply by finding that a particular state rule is, in the opinion of the federal court, inconsistent. This is a powerful way around AEDPA's various restrictions. For example, the Third Circuit recently held that Pennsylvania's own time-limit on state collateral review was inconsistently applied in death penalty cases for the first few years after its enactment in 1996 – despite the fact that the deadline has always been strictly and uniformly applied exactly as it was written. See Bronshtein v. Horn, 404 F.3d 700, 707-710 (3d Cir. 2005). For the Third Circuit, the mere possibility that death penalty defendants could imagine an

exception to the deadline in capital cases – an exception that is nowhere in the statute, and which was never applied to the time-bar by Pennsylvania courts – rendered the state deadline somehow unpredictable and inadequate, until the state supreme court explicitly rejected it. As a result, there is now apparently no such thing as default in Pennsylvania capital cases pending in the late 1990's, which is virtually all of the death penalty cases now pending in habeas. Criminals in these cases are presumably able to raise entirely new claims and introduce new evidence, without any showing of innocence. The burden on the State to relitigate these cases is huge; the emotional burden on the victims' families is incalculable.

The loose application of "inadequacy" creates a perverse incentive for states to adopt rules with absolutely no exceptions and no room for judicial discretion. This is not a desirable result, for prisoners or anyone else.

The "ends of justice" exception

Another way around procedural default is through use of the "independence" requirement – that is, a state procedural rule must be "independent" of federal law, or the federal courts can overlook it. The rationale is, if the state rule is intertwined with, or dependent on, federal law, then the application of the rule amounts to a decision on the merits of the federal claim. But sometimes, the "independence" requirement is applied in peculiar ways. For example, many states have an "ends of justice" exception to their rules and deadlines. Some federal courts have held that if the "ends of justice" exception involves a cursory review of the merits of the claim – however fleeting – then the application of the rule is "dependent" on federal law and there is no default. See, e.g.,

Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990) (no default under Washington State rule because it includes "ends of justice" exception).

In addition to providing yet another mechanism for evading AEDPA's deference requirements, as well as the rule of exhaustion, this creates another perverse incentive for states to create absolute rules with zero exceptions, whether it serves justice or not.

The "actual innocence" standard

A showing of "actual innocence" allows petitioners to go forward with their habeas case, despite the existence of various bars. This obviously serves the interest of justice – no one wants to see the innocent wrongly punished. But the bar must be set high for these claims, and it is easy to see why. Claims of innocence are routinely made. They are the rule, not the exception. For the most part, however, claims of "innocence" are simply dressed-up attempts to argue the evidence all over again. If the mere allegation of innocence is enough to re-open otherwise barred claims, then nothing would ever be final. An incrementally higher standard – say, requiring the petitioner to make a "colorable" claim of innocence – would ultimately be no better. Many (if not most) defendants who go to trial have a "colorable" claim of innocence. But in the end, the jury may conclude that guilt has nevertheless been proven beyond a reasonable doubt – after all, "beyond a reasonable doubt" does not mean "beyond *all* possible doubt."

The only workable solution is to set the bar very high for claims of "actual innocence." The presumption of guilt, which attaches when a defendant is convicted, should not be pierced unless there is new evidence that the jury did not hear. Nor is this enough by itself, because it is always possible to find (or create) unpersuasive new

evidence. The new evidence must be convincing enough to mean that no reasonable juror would have voted to convict. This is the standard of Schlup v. Delo, 513 U.S. 298, 329 (1995), and it is the standard used at various points in the Streamlined Procedures Act. It is the only bar-overcoming "innocence" standard that makes sense. In her concurring opinion in Herrera v. Collins, 506 U.S. 390, 419-20, 426-27 (1993), Justice O'Connor, with Justice Kennedy concurring, stressed this point: If the "actual innocence" standard is too easy to meet, "the federal courts will be deluged with frivolous claims of actual innocence" by prisoners "who, refusing to accept the jury's verdict, demand[] a hearing in which to have [their] culpability determined once again." To avoid such a result, "[I]f the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case."

A couple of examples from my recent experience will, I hope, make the point more clear. First, there is a man named Raymond Smolsky who repeatedly molested and raped a five-year-old girl in Philadelphia about seventeen years ago. He filed a habeas petition in 2000, raising some claims that he had not properly presented to the state courts; but, he claimed, he was "innocent" and the victim had recanted, so he contended that everything was subject to more review. But the recantation was ambiguously worded; when we investigated, the victim – now a young woman – told us that the defense investigator had misled her. This investigator had not clearly identified herself as a member of the defense team; she had urged the victim to sign the statement while assuring her that Smolsky would remain in prison; and the statement (written by the defense) had been worded just ambiguously enough to make it sound as if Smolsky had not committed rape, when in fact he had. The victim was mortified when we told her that

she had signed a defense-prepared affidavit that was designed to get Smolsky out of prison.

Smolsky's strategy had been to manufacture evidence to qualify under the "actual evidence" standard; otherwise, his claims were barred. We were able to convince the court that this new "evidence" should be examined first by the state court, and the habeas petition is now stayed pending state court proceedings. In the meantime, the victim has been dragged back into the case. An easy-to-meet, defendant-friendly standard will encourage more of this kind of abuse.

Aaron Jones is another criminal who has tried to take advantage of the "actual innocence" standard to relitigate his case. Jones was the head of a notorious and violent Philadelphia drug gang, which was finally brought to justice after extensive federal and state investigations. Part of the problem was that this gang had a pattern of murdering witnesses (including other gang members) who would dare cooperate with authorities. Jones was finally, after much effort, convicted of murder and sentenced to death. After years of state court appeals and review, Jones filed a federal habeas petition with many completely new claims, and a request for wide-ranging discovery into state and federal files, including information about witnesses who are still in the witness protection program. We pointed out that many of his claims were unreviewable because they had not been properly presented to the state courts, and the discovery was thus unjustified. But Jones argued that he had made a claim of "actual innocence" which put everything back on the table. His evidence of innocence, however, was simply a re-hash of his earlier argument that the prosecution's witnesses were lying to curry favor with the

government. He simply hoped to obtain more discovery because he might discover something helpful that he hadn't found before.

As of this date, both state and federal authorities have provided yet more discovery in the Jones case. The district court recently stayed the case and sent Jones back to state court. If the state holds any of Jones' claims to be procedurally barred – for example, if they are late or waived – presumably Jones will trot out the same claims of innocence when he returns to federal court and seeks more review.

While it is important to protect the innocent, an "actual innocence" exception to various bars and deadlines is a potentially major loophole. It provides a continuing incentive to re-argue old facts, manufacture new evidence, and intimidate victims and witnesses. The "innocence" exception must be strict, and it must be guarded carefully.

Evading rules through allegations of "ineffective" counsel.

Perhaps the most common way of reviving waived claims, in both state and federal court, is through an allegation that defense counsel provided such incompetent representation as to violate the constitutional guarantee of effective counsel. Usually, the petitioner complains that his lawyer should have made an objection of some kind, but did not. Such claims turn on three inquiries: (1) How meritorious was the claim that wasn't raised? (2) Did the defense counsel have an understandable reason for not making the argument? And (3) Did the "omission" change the outcome of the trial? In federal habeas cases, these claims too often focus on the first prong (the merits of the waived

claim) without any consideration of the second or third (counsel's possible reasoning, and the prejudice to the defendant). In practice, that means that the waived claim gets reviewed as if it were properly preserved. Even more disturbingly, these allegations often involve issues of state law that the defense lawyer didn't raise – for example, an evidentiary objection, or a state rule of procedure – and the federal court simply converts itself into an arbiter of state law as it decides whether the foregone objection was meritorious.

Sometimes, the issue is even further confused by misapplication of the exhaustion rules. Some federal judges have held that where a prisoner has raised a claim of ineffectiveness in state court, this not only serves to exhaust the ineffectiveness claim, but the underlying issue as well, which can be freely reviewed on the merits by the federal court, as if the defense lawyer had actually made the objection. For example, see Veal v. Myers, 326 F.Supp.2d 612, 617 (E.D. Pa. 2004).

The only way to justify federal court adjudication of ineffectiveness claims, is to focus on counsel's conduct rather than the underlying allegation of error, and to recognize that exhaustion of an ineffectiveness claim is very different from proper preservation and exhaustion of the underlying claim. Otherwise, the federal court will routinely decide waived claims, and resolve state law issues, without a proper focus on the lawyer's conduct.

II. SECTION-BY-SECTION ANALYSIS OF HOW THE STREAMLINED PROCEDURES ACT WILL ADDRESS THESE PROBLEMS

SECTION 2: MIXED PETITIONS

This section sets out a new procedure for dealing with habeas petitions that contain both exhausted and unexhausted claims. The exhausted claims will be considered; the unexhausted claims will be dismissed with prejudice, meaning that they cannot be raised again in federal court absent extraordinary circumstances.

Under this provision, prisoners will no longer be able to obtain a stay to exhaust their claims that were never presented to the state courts, as I described in the previous section. They must, rather, abide by the statute of limitations. Further, this provision creates clear, negative consequences for prisoners who do not exhaust their claims before coming to federal court – thus ensuring that they will attempt to raise every claim in state court at the first opportunity, which is, after all, the goal of the exhaustion requirement.

This section also clarifies requirements for pleading exhaustion of state remedies. Under the new 2254(b)(1)(A)(i), the prisoner must clearly present the federal claim to state courts, and he must identify the stage of the state proceedings where he did so, in order to proceed on the claim in federal habeas. This will ensure that states actually have the chance to decide each and every federal claim the petitioner later presents to federal court – instead of having to guess what the prisoner might mean by vague references to "due process" or the like.

Finally, this provision sets out a standard of review for unexhausted claims that, nevertheless, ultimately qualify for federal review. These claims must be denied unless "the denial of relief is contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See Section 2254(b)(1)(B)(ii). This is the familiar AEDPA standard that elsewhere governs review of claims that have been decided by the state courts. (In several other sections of

the SPA, the same familiar standard is applied to other claims that qualify for federal review but were not decided by the state courts, either because they were never submitted, or were not submitted in accordance with state rules.) Applying this standard across the board ensures that petitioners who do not properly submit their claims to the state courts are not in a better position, with a more claimant-friendly standard of review, than prisoners who *do* properly submit their claims to the state courts. This standard also codifies a presumption of constitutionality: If reasonable minds can disagree over whether there was any error, then in deference to the states, the conviction will remain undisturbed.

SECTION 3: AMENDMENTS TO PETITIONS

This section of the Act provides a straightforward remedy to a common problem: Sometimes, petitioners who file timely habeas petitions later try to add more claims, after the one-year deadline has passed. Under this subsection, a petition may be amended once as a matter of course before the State files its response, and the one-year deadline passes. After that, no more amendments will be allowed, unless the prisoner meets the "actual innocence" standard. This is one more way to combat delay, and to require that the petitioner make all of his claims up front, in a timely manner.

SECTION 4: PROCEDURALLY DEFAULTED CLAIMS

This section addresses the various ways described above by which the federal courts can ignore state procedural defaults. It sets out one clear standard: If a claim has

been procedurally defaulted in state court, it will be barred from consideration in federal habeas unless it implicates meaningful evidence of actual innocence.

The enactment of this section would address the various evasions of default in several ways. First, the "inconsistent application" method of avoiding state procedural defaults would no longer be available. Federal courts would no longer be in a position to "grade" state procedural rules governing state convictions – the only way to overcome a default would be through a convincing showing of innocence. Second, states would be free to incorporate exceptions to their rules for miscarriages of justice, without running the risk that the federal court would find that the rule is no longer predictable or "independent" of federal law. Third, this section bars ineffectiveness-of-counsel claims that are derivative of defaulted claims, in order to prevent prisoners from avoiding the consequences of a state default by recasting the claim in ineffectiveness terms.

The message is clear – all federal claims must be properly exhausted in the state courts, in accordance with state rules, or the federal court will not hear it without a meaningful showing of innocence. Enactment of this provision will give back to the states the power to make and enforce their own procedural rules without undue federal interference.

SECTION 5: TOLLING OF LIMITATION PERIOD

These important provisions relate to the one-year habeas deadline enacted in 1996. Under the current § 2244(d)(2), that deadline is tolled while the prisoner pursues state collateral relief – specifically, the habeas clock stops while a "properly filed" state collateral petition is "pending." The proposed language clarifies several key points.

First, the habeas deadline is tolled only where the petitioner seeks review of federal claims that may later form the basis of a habeas petition; litigation of unrelated state claims do not extend the federal deadline. Second, this provision clearly limits tolling to the period where the claims are actually pending before a state court. If the prisoner's state petition is rejected by one court, and he waits awhile before appealing or otherwise challenging the decision, the time in-between is not "pending" and has no tolling effect. This would eliminate the phantom, make-believe period of "pendingness," when nothing is actually pending, that Judge Easterbrook criticized in Fernandez v. Sternes, 227 F.3d 977, 980 (7th Cir. 2000).

The third change is, I think, the most important. The new § 2254(d)(4) would limit the grounds for allowing tolling of the one-year habeas deadline to those grounds actually identified in the statute. This would curtail the enormous explosion of "equitable tolling" litigation. If the prisoner has new evidence, or relies on a new rule of law, or has been prevented from filing by government officials, or is properly pursuing state collateral review, the deadline is postponed or tolled. Otherwise, it is not tolled. This would prevent results like that in the Robert Graham case described above, where a costly battle of experts, and Graham's supposed inability to "trust" others to do his legal work, was enough for the prisoner to evade the deadline for years. It is also common sense, because presumably AEDPA means what it says, and if a ground for tolling does not appear in the statute then it should not be applied.

SECTION 6: HARMLESS ERROR IN SENTENCING

This provision is aimed at the particular problems arising from claims of state sentencing errors. This type of complaint can easily devolve into fact-intensive second-guessing about whether the alleged sentencing mistake made any difference. As the law currently stands, it is confusing – federal courts ask whether a state court's finding that the error could not reasonably have affected the sentencing was itself reasonable. In addition to creating a tangled, two-layered reasonableness review, this standard inevitably involves a subjective re-weighing of the facts.

The proposed new language replaces the fact-intensive inquiry with a legal inquiry: Rather than asking about the likely impact of the weight of the evidence on local juries, the new standard asks whether the error itself rises to the level of "structural" error. The Supreme Court has identified several kinds of "structural" errors that merit reversal without a harmlessness analysis. If the alleged sentencing error fits into this category, then relief may issue. If not, then a sentencing error that was determined by the state courts to have been harmless may not be second-guessed.

It is worth emphasizing that this section only applies to sentencing claims. Also, no one who asserts innocence of the underlying offense will see his options limited by this section. This section merely precludes a repeat of the state review process in federal court for sentencing errors that are not related to guilt of the underlying offense.

SECTION 7: UNIFIED REVIEW STANDARD

In 1997, the Supreme Court held that many of AEDPA's reforms would only apply to petitions filed after April 24, 1996. Lindh v. Murphy, 521 U.S. 320 (1997).

Even now, because sometimes habeas litigation is so drawn out, there are pending habeas petitions to which AEDPA does not fully apply. This section would eliminate the need to apply the pre-1996 regime to any claims still pending today.

SECTION 8: APPEALS

This section addresses the delays that often afflict habeas appeals, as described by my colleague Ronald Eisenberg in his testimony before the House subcommittee (a copy of which is attached). Subsection 8(a) sets clear, generous but firm deadlines. A court of appeals will be required to decide habeas appeals within 300 days of the completion of the briefing. The court of appeals must also decide whether to grant a petition for rehearing or rehearing *en banc* within 90 days. If a three-judge panel grants rehearing, it must decide the case within 120 days after the grant of rehearing. If the full court grants rehearing, it must decide the case within 180 days.

This section accomplishes two other things as well. Subsection 8(l)(1) provides that the State is automatically entitled to a stay of the judgment while it appeals the district court's grant of relief, which is sometimes the subject of unnecessary litigation. Subsection 8(b) bars courts of appeals from rehearing successive petition applications on their own motion. Current law bars petitioners from seeking rehearing of denials of such petitions, but some courts have concluded that they have the power to rehear these applications *sua sponte*. This provision closes the loophole.

SECTION 9: CAPITAL CASES

The AEDPA habeas reforms included a set of comprehensive provisions governing capital cases. See Chapter 154, Title 28. These provisions included special time requirements, tolling rules, and strict standards of review. The section also required the States to meet certain requirements, regarding standards for defense counsel, as a prerequisite to qualify for these special rules. The problem is, as of now the court that decides whether a State is eligible for Chapter 154 is the same court that would be subject to its various limits; not surprisingly, these courts have been reluctant to grant such eligibility.

The proposed subsection fixes this problem by placing the eligibility decision in the hands of the U.S. Attorney General, with review of his decision in the D.C. Circuit. In addition, the new provision grants district courts more time to review these capital petitions (15 months, instead of 6 months), and limits relief to claims implicating meaningful evidence of actual innocence.

SECTION 10: CLEMENCY AND PARDON DECISIONS

State clemency proceedings are an important "fail-safe" for catching fundamental errors and protecting the innocent. Formalized clemency procedures ensure that prisoners have better access to these mechanisms. Nevertheless, some prisoners have brought challenges to state clemency procedures in federal court, once again creating a perverse incentive for states to have any formal procedure at all. No one benefits from this result. This section bars lower federal courts from entertaining these challenges, and

ensures that states will not be discouraged by the threat of litigation from formalizing and codifying their clemency procedures.

SECTION 11: EX PARTE FUNDING REQUESTS

Current law allows capital prisoners to request funds for their habeas litigation *ex parte* – that is, without the presence of the prosecution. This practice can create bias in the judge who hears the request (who does not hear the prosecution's side of the story) and sometimes results in funding for claims that have been waived or defaulted – because if the prosecution is not present, these objections cannot be made. This section bars *ex parte* requests, except to the extent necessary to protect attorney-client privilege. It also requires that the judge who hears the funding request not be the same judge who ultimately hears the petition.

SECTION 12: CRIME VICTIMS' RIGHTS

Because federal habeas petitions are often so far removed in space and time from the state proceedings – let alone the crime itself – the rights of victims are undervalued, and their views are too often disregarded. This section extends to crime victims in habeas proceedings for state convictions the same rights made available last year to victims in federal prosecutions under the Crime Victims' Rights Act of 2004. These rights include the right to be present at court proceedings and the right to be notified of developments in a case.

SECTION 13: TECHNICAL CORRECTIONS

Subsection (a) of section 13 fixes a drafting error in the 1996 Act, concerning who has the authority to issue a certificate of appealability when a habeas petition is denied by the district courts. Section 2253 currently states that these certificates can be issues by a "circuit justice or judge," and the new language would replace this with "district or circuit judge." This change will not work a substantive change in the law, because the courts have been applying the law as if the new language were already included.

Subsection (b) designates the various paragraphs of section 2255, governing postconviction review for Federal prisoners, as subsections, thus making this rather long provision easier to navigate and cite.

SECTION 14: APPLICATION TO PENDING CASES

This section makes the changes of the Streamlined Procedures Act applicable to defendants who already have initiated federal habeas petitions. Although habeas corpus is a civil proceeding, and any changes to civil proceedings generally apply to pending cases, this is not the result reached by the Supreme Court when AEDPA was enacted. See Lindh v. Murphy, 521 U.S. 320 (1997) (AEDPA reforms do not apply to cases pending at time of enactment). This section would prevent a similar result here, and ensure that the normal rules of construction would apply. The section also provides that if any deadline imposed by the proposed legislation would run from an event that preceded the Act's enactment, the deadline will be shifted to run instead from the date of enactment.

CONCLUSION

The various sections of the Streamlined Procedures Act address some real problems in the current practice of federal habeas corpus. I urge the Committee to give it careful consideration and to support its reforms. Thank you.